



U.S. Department of Justice

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Environment and Natural Resources Division

JMG:JDF
90-11-2-07106

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November 2, 2000

BY FACSIMILE

John D. McCarthy, Esq.
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1700 Lincoln Street
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Denver, Colorado 80203-4541

**Re: United States v. W.R. Grace & Co., et al.;
Civil Action No. 00-167-M-DWM**

Dear Jay:

This is in response to your October 19, 2000 letter and to Alan Stringer's September 27, 2000 letter to the Libby Community Advisory Group, which cover similar issues.

As an initial matter, I disagree with your contention that EPA has no legal authority to dispose of asbestos-contaminated soil removed from the screening properties at the Mine site. As we have demonstrated in our briefs, Section 104(e)(3)(D) of CERCLA, 42 U.S.C. § 9604(e)(3)(D), clearly gives EPA the authority to enter the Mine site to "effectuate a response action." Moreover, you state that my October 11 letter was an "attempt to rein in the scope of EPA's demand" for access. The only thing I intended to "rein in" was Grace's characterization of EPA's demand. I believe EPA's request for access was and continues to be reasonable.

Grace makes the unsupported contention in both letters that the Parker's property (a property located on the site of Grace's former screening plant that is no longer owned by Grace or its subsidiary KDC) may be contaminated with pesticides. As I have previously indicated, EPA has no reason to suspect that the Parker's property is contaminated with anything other than asbestos. However, to address Grace's concern EPA recently conducted extensive sampling of the soil on the Parker's property to determine whether a variety of potential contaminants, including a standard test suite for pesticides and herbicides, are present in the soil stockpile. The EPA sampling indicates no detectable pesticide residues. Petroleum hydrocarbons were detected in a few of the

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samples. The maximum concentration was 210 parts per million, a level far below that of regulatory concern. I have enclosed the results of the sampling. I note that Grace was given splits of these soil samples, as well as of the soil samples taken from the Parker's property in the spring. I assume that Grace's silence on the results of its sampling efforts is an indication that Grace has not found any contamination (other than asbestos, of course) in the soils on the Parker's property. I trust the test results resolve this issue, and that Grace no longer contends, as stated in Mr. Stringer's letter, that there are chemicals in the soil at the Parker's property "that could find their way into the local waters."

Mr. Stringer's letter also states that "we must know who is responsible for the safety of the workers that will be moving dirt from the old screening plant to the former mine, if access is granted." As I mentioned in my October 11 letter, EPA requires all of its contractors to maintain insurance policies that cover injuries that result from their actions. You state in your October 19 letter that such insurance is "unlikely to protect KDC adequately, if at all." However, you do not state why. These are standard insurance policies that EPA requires its cleanup contractors to have at sites across the country, so I am surprised that you are so certain that they will be insufficient in this case. But more to the point, you do not articulate – either in your letters or your briefs – why this is a relevant basis on which to refuse to provide access. I am aware of no provision in CERCLA or relevant case law that permits a property owner to deny an EPA request for access based upon contentions regarding the sufficiency of EPA's insurance.

In your letter, you request a copy of EPA's work plan and related documents for its work at the screening plant properties. EPA's draft work plan has been available at the Information Center in Libby since April 2000. Numerous members of the public commented on the work plan, but I understand that Grace did not. The work plan was finalized in May, and is available at the Information Center. If you have trouble locating it, please let me know.

Your letter also states that EPA should indemnify KDC as a response action contractor, which you claim is authorized under 42 U.S.C. § 9617(c). First, I believe you intended to reference 42 U.S.C. § 9619(c), which deals with indemnification of response action contractors. Second, please note that 42 U.S.C. § 9619(d) prevents EPA from offering indemnification to any entities covered by one of the four categories of potentially responsible parties identified in 42 U.S.C. § 9607(a). As KDC is the current owner of contaminated property that is part of the Libby Asbestos Site and a subsidiary of the former owner and operator of the property, it would appear to be ineligible for indemnification. This provision would not apply to Marcor, the company identified in your footnote 4, because Marcor is not a potentially responsible party at the site.

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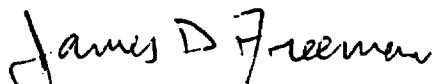
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Finally, you state that KDC should be indemnified and compensated for allowing EPA to dispose of soil from the screening plant at the Mine. As these issues have been addressed in my prior correspondence, I will not discuss them again here. I do note, however, that your letter does not address a central point: KDC is a subsidiary of W.R. Grace, which owned and operated the screening plant (including the property now owned by the Parkers) when it was contaminated with asbestos. While the Court has not yet been asked to rule on Grace's legal liability for cleaning up, or reimbursing EPA for cleaning up, the asbestos contamination resulting from its operations at the former screening plant, I would think that as a matter of responsible corporate citizenship Grace would have an interest in helping EPA conduct the clean up in as fast and economical manner as possible. This would include providing EPA access to property owned by its subsidiary and allowing EPA to dispose of asbestos-contaminated soil at the Mine (where, as I have noted before, Grace is already disposing of asbestos contaminated soil removed from other locations within Libby). If you believe that EPA's planned actions constitute a taking requiring the government to pay compensation, Grace (or its subsidiary) may bring such an action in the appropriate forum without further delaying the clean up. Instead, Grace appears to be taking the path of obstruction and delay.

In its September 12, 2000 letter, Grace provided several reasons for its refusal to provide access to the KDC properties. While none of the reasons constitute a valid basis for refusing to provide access, I have answered your questions or explained why they are not relevant in my September 19 and October 11 letters, as well as this letter. I request that Grace reconsider its decision to deny access and allow EPA to move forward with the cleanup of the screening plant properties. As I discussed in my October 26 letter to you, once access is provided and the removal action is commenced, we are willing to discuss ways in which we can transition responsibility for this clean up action to Grace, if that is the company's desire.

Please contact me if you have any questions about this matter.

Sincerely,



James D. Freeman
Trial Attorney

cc: Matthew Cohn, EPA

LIBBY, MT: Borrow Soils (Revised 10-17-00)

Results For L0009091

Account: CDM-MT - Camp Dresser & McKee, Inc.

Project: 2603-006-002-FLD

Samples Received by Alpha on 10-OCT-00

LOCATION	Stockpile 1 IR-02584	Stockpile 1 dup IR-02585	Stockpile 2 IR-02586	Stockpile 3 IR-02587	Stockpile 4 IR-02588	Stockpile 5 IR-02589	Stockpile 6 IR-02590
SAMPLING DATE	6-Oct-00	6-Oct-00	6-Oct-00	6-Oct-00	6-Oct-00	6-Oct-00	6-Oct-00
LAB SAMPLE ID	L0009091-01 Units	L0009091-02 Units	L0009091-03 Units	L0009091-04 Units	L0009091-05 Units	L0009091-06 Units	L0009091-07 Units
PARAMETER							
Hydrocarbons, Total(IR)	110 mg/kg	69 mg/kg	50 mg/kg	170 mg/kg	210 mg/kg	140 mg/kg	78 mg/kg
Antimony, Total	<2 mg/kg	<2 mg/kg	<2 mg/kg	<2 mg/kg	<2 mg/kg	<2 mg/kg	<2 mg/kg
Arsenic, Total	2.8 mg/kg	2.6 mg/kg	4 mg/kg	2.5 mg/kg	2.6 mg/kg	1.8 mg/kg	2.2 mg/kg
Beryllium, Total	0.34 mg/kg	0.26 mg/kg	0.24 mg/kg	<0.2 mg/kg	<0.2 mg/kg	<0.2 mg/kg	0.24 mg/kg
Cadmium, Total	<0.4 mg/kg	<0.4 mg/kg	<0.4 mg/kg	<0.4 mg/kg	<0.4 mg/kg	<0.4 mg/kg	<0.39 mg/kg
Chromium, Total	62 mg/kg	57 mg/kg	16 mg/kg	100 mg/kg	77 mg/kg	110 mg/kg	83 mg/kg
Copper, Total	39 mg/kg	39 mg/kg	36 mg/kg	27 mg/kg	27 mg/kg	23 mg/kg	31 mg/kg
Lead, Total	18 mg/kg	14 mg/kg	12 mg/kg	13 mg/kg	14 mg/kg	9.9 mg/kg	12 mg/kg
Mercury, Total	<0.25 mg/kg	<0.25 mg/kg	<0.25 mg/kg	<0.25 mg/kg	<0.25 mg/kg	<0.25 mg/kg	<0.25 mg/kg
Nickel, Total	16 mg/kg	14 mg/kg	10 mg/kg	19 mg/kg	18 mg/kg	19 mg/kg	16 mg/kg
Selenium, Total	<0.79 mg/kg	<0.79 mg/kg	<0.79 mg/kg	<0.8 mg/kg	<0.79 mg/kg	<0.8 mg/kg	<0.79 mg/kg
Silver, Total	<0.4 mg/kg	<0.4 mg/kg	<0.4 mg/kg	<0.4 mg/kg	<0.4 mg/kg	<0.4 mg/kg	<0.39 mg/kg
Thallium, Total	<0.79 mg/kg	<0.79 mg/kg	<0.79 mg/kg	<0.8 mg/kg	<0.79 mg/kg	<0.8 mg/kg	<0.79 mg/kg
Zinc, Total	43 mg/kg	37 mg/kg	31 mg/kg	30 mg/kg	32 mg/kg	25 mg/kg	34 mg/kg
VOCs:							
Methylene chloride	<290 ug/kg	<280 ug/kg	<290 ug/kg	<290 ug/kg	<290 ug/kg	<290 ug/kg	<290 ug/kg
1,1-Dichloroethane	<8.1 ug/kg	<7.6 ug/kg	<7.8 ug/kg	<8.1 ug/kg	<7.6 ug/kg	<7.8 ug/kg	<8 ug/kg
Chloroform	<8.1 ug/kg	<7.8 ug/kg	<7.8 ug/kg	<8.1 ug/kg	<7.6 ug/kg	<7.8 ug/kg	<8 ug/kg
Carbon tetrachloride	<5.4 ug/kg	<5 ug/kg	<5.2 ug/kg	<5.4 ug/kg	<5.1 ug/kg	<5.2 ug/kg	<5.3 ug/kg
1,2-Dichloropropane	<19 ug/kg	<18 ug/kg	<18 ug/kg	<19 ug/kg	<18 ug/kg	<18 ug/kg	<19 ug/kg
Dibromochloromethane	<5.4 ug/kg	<5 ug/kg	<5.2 ug/kg	<5.4 ug/kg	<5.1 ug/kg	<5.2 ug/kg	<5.3 ug/kg
1,1,2-Trichloroethane	<8.1 ug/kg	<7.6 ug/kg	<7.8 ug/kg	<8.1 ug/kg	<7.6 ug/kg	<7.8 ug/kg	<8 ug/kg
Tetrachloroethene	<5.4 ug/kg	<5 ug/kg	<5.2 ug/kg	<5.4 ug/kg	<5.1 ug/kg	<5.2 ug/kg	<5.3 ug/kg
Chlorobenzene	<19 ug/kg	<18 ug/kg	<18 ug/kg	<19 ug/kg	<18 ug/kg	<18 ug/kg	<19 ug/kg
Trichlorofluoromethane	<27 ug/kg	<25 ug/kg	<26 ug/kg	<27 ug/kg	<26 ug/kg	<26 ug/kg	<26 ug/kg
1,2-Dichloroethane	<5.4 ug/kg	<5 ug/kg	<5.2 ug/kg	<5.4 ug/kg	<5.1 ug/kg	<5.2 ug/kg	<5.3 ug/kg
1,1,1-Trichloroethane	<5.4 ug/kg	<5 ug/kg	<5.2 ug/kg	<5.4 ug/kg	<5.1 ug/kg	<5.2 ug/kg	<5.3 ug/kg
Bromodichloromethane	<5.4 ug/kg	<5 ug/kg	<5.2 ug/kg	<5.4 ug/kg	<5.1 ug/kg	<5.2 ug/kg	<5.3 ug/kg
trans-1,3-Dichloropropene	<5.4 ug/kg	<5 ug/kg	<5.2 ug/kg	<5.4 ug/kg	<5.1 ug/kg	<5.2 ug/kg	<5.3 ug/kg
cis-1,3-Dichloropropene	<5.4 ug/kg	<5 ug/kg	<5.2 ug/kg	<5.4 ug/kg	<5.1 ug/kg	<5.2 ug/kg	<5.3 ug/kg
1,1-Dichloropropene	<27 ug/kg	<25 ug/kg	<26 ug/kg	<27 ug/kg	<26 ug/kg	<26 ug/kg	<26 ug/kg
Bromoform	<5.4 ug/kg	<5 ug/kg	<5.2 ug/kg	<5.4 ug/kg	<5.1 ug/kg	<5.2 ug/kg	<5.3 ug/kg
1,1,2,2-Tetrachloroethane	<5.4 ug/kg	<5 ug/kg	<5.2 ug/kg	<5.4 ug/kg	<5.1 ug/kg	<5.2 ug/kg	<5.3 ug/kg
Benzene	<5.4 ug/kg	<5 ug/kg	<5.2 ug/kg	<5.4 ug/kg	<5.1 ug/kg	<5.2 ug/kg	<5.3 ug/kg
Toluene	<8.1 ug/kg	<7.6 ug/kg	<7.8 ug/kg	<8.1 ug/kg	<7.6 ug/kg	<7.8 ug/kg	<8 ug/kg
Ethylbenzene	<5.4 ug/kg	<5 ug/kg	<5.2 ug/kg	<5.4 ug/kg	<5.1 ug/kg	<5.2 ug/kg	<5.3 ug/kg
Chloromethane	<54 ug/kg	<50 ug/kg	<52 ug/kg	<54 ug/kg	<51 ug/kg	<52 ug/kg	<53 ug/kg

Bromomethane	<10 ug/kg	<10 ug/kg
Vinyl chloride	<10 ug/kg	<10 ug/kg
Chloorethane	<10 ug/kg	<10 ug/kg
1,1-Dichloroethene	<10 ug/kg	<10 ug/kg
trans-1,2-Dichloroethene	<7.6 ug/kg	<7.8 ug/kg
Trichloroethene	<8.1 ug/kg	<8.1 ug/kg
1,2-Dichlorobenzene	<27 ug/kg	<25 ug/kg
1,3-Dichlorobenzene	<27 ug/kg	<25 ug/kg
1,4-Dichlorobenzene	<27 ug/kg	<25 ug/kg
Methyl tert butyl ether	<22 ug/kg	<20 ug/kg
p/m-Xylene	<5.4 ug/kg	<5 ug/kg
o-Xylene	<5.4 ug/kg	<5 ug/kg
cis-1,2-Dichloroethylene	<5.4 ug/kg	<5 ug/kg
Dibromomethane	<54 ug/kg	<50 ug/kg
1,4-Dichlorobutane	<54 ug/kg	<50 ug/kg
Iodomethane	<54 ug/kg	<50 ug/kg
1,2,3-Trichloropropane	<54 ug/kg	<50 ug/kg
Syrene	<5.4 ug/kg	<5 ug/kg
Dichlorodifluoromethane	<54 ug/kg	<50 ug/kg
Acetone	<54 ug/kg	<50 ug/kg
Carbon disulfide	<54 ug/kg	<50 ug/kg
2-Butanone	<54 ug/kg	<50 ug/kg
Vinyl acetate	<54 ug/kg	<50 ug/kg
4-Methyl-2-pentanone	<54 ug/kg	<50 ug/kg
2-Hexanone	<54 ug/kg	<50 ug/kg
Ethyl methacrylate	<54 ug/kg	<50 ug/kg
Acrolein	<130 ug/kg	<130 ug/kg
Acrylonitrile	<54 ug/kg	<50 ug/kg
Bromochloromethane	<27 ug/kg	<25 ug/kg
Tetrahydrofuran	<110 ug/kg	<100 ug/kg
2,2-Dichloropropane	<27 ug/kg	<25 ug/kg
1,2-Dibromoethane	<27 ug/kg	<25 ug/kg
1,3-Dichloropropane	<27 ug/kg	<25 ug/kg
1,1,1,2-Tetrachloroethane	<27 ug/kg	<25 ug/kg
Bromobenzene	<27 ug/kg	<25 ug/kg
n-Butylbenzene	<27 ug/kg	<25 ug/kg
sec-Butylbenzene	<27 ug/kg	<25 ug/kg
tert-Butylbenzene	<27 ug/kg	<25 ug/kg
o-Chlorotoluene	<27 ug/kg	<25 ug/kg
p-Chlorotoluene	<27 ug/kg	<25 ug/kg
p-Dibromo-3-chloropropene	<500 ug/kg	<500 ug/kg
Naphthalene	<27 ug/kg	<25 ug/kg
n-Propylbenzene	<27 ug/kg	<25 ug/kg
Hexachlorobutadiene	<27 ug/kg	<25 ug/kg
Isopropylbenzene	<27 ug/kg	<25 ug/kg
p-Isopropylbenzene	<27 ug/kg	<25 ug/kg
Naphthalene	<500 ug/kg	<500 ug/kg
1,2,3-Trichlorobenzene	<27 ug/kg	<25 ug/kg
1,2,4-Trichlorobenzene	<27 ug/kg	<25 ug/kg
1,3,5-Trimethylbenzene	<27 ug/kg	<26 ug/kg
1,2,4-Trimethylbenzene	<27 ug/kg	<26 ug/kg
trans-1,4-Dichloro-2-butene	<27 ug/kg	<26 ug/kg

Aroclor 1248 <200 ug/kg **Aroclor 1254** <200 ug/kg **Aroclor 1260** <200 ug/kg **Aroclor 1262** <200 ug/kg **Aroclor 1265** <200 ug/kg **Aroclor 1268** <200 ug/kg **Aroclor 1270** <200 ug/kg **Aroclor 1271** <200 ug/kg

HERBICIDES: